

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | |
|------------------------|---|
| JACK BARNETT, |) |
| LINDA BARNETT, |) |
| PHILIP BARNETT, |) |
| MARY JANE BARNETT, |) |
| MARY FRANCIS BOSECKER, |) |
| GAIL BULLOCK, |) |
| JUNE BULLOCK, |) |
| ROSCOE BYERS, |) |
| CONNIE BYERS, |) |
| WILLIAM COOK, |) |
| MOLLY COOK, |) |
| NANCY HECK, |) |
| EDDIE HERR, |) |
| GARY HERR, |) |
| JOE HOWARD, |) |
| GINGER HOWARD, |) |
| JON HUFFMAN, |) |
| MELISSA HUFFMAN, |) |
| CECIL KIRK, |) |
| PATTY KIRK, |) |
| MIKE KRESS, |) |
| JACKIE KRESS, |) |
| ERNEST KROEGER, |) |
| BILL MERKLEY, |) |
| REBECCA MERKLEY, |) |
| JAMES OSKINS, |) |
| FERN OSKINS, |) |
| LEON OXLEY, |) |
| LANA OXLEY, |) |
| VICTORIA ROBLING, |) |
| CHARLES SCHERZINGER, |) |
| CINDY SCHERZINGER, |) |
| JEFF SIMPSON, |) |
| SANDRA MURPHY, |) |
| FRED THIEN, |) |
| RUTH THIEN, |) |
| WILLIAM D. TRIBBIE, |) |
| CLARENCE WOLFE, |) |
| JANICE WOLFE, |) |
| JOHN ZIMMERMAN, |) |
| CHRISTINE ZIMMERMAN, |) |
| |) |

| | | |
|--------------------|---|---------------------------|
| Plaintiffs, |) | |
| vs. |) | NO. 3:06-cv-00184-RLY-WGH |
| |) | |
| ALCOA, INC., |) | |
| ALCOA FUELS, INC., |) | |
| |) | |
| Defendants. |) | |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JACK AND LINDA BARNETT, PHILIP)
AND MARY JANE BARNETT, MARY)
FRANCIS BOSECKER, GAIL AND JUNE)
BULLOCK, ROSCOE AND CONNIE BYERS,)
WILLIAM AND MOLLY COOK, NANCY)
HECK, EDDIE HERR, GARY HERR, JOE)
AND GINGER HOWARD, JON AND)
MELISSA HUFFMAN, CECIL AND)
PATTY KIRK, MIKE AND JACKIE KRESS,)
ERNEST KROEGER, BILL AND REBECCA)
MERKLEY, JAMES AND FERN OSKINS,)
LEON AND LANA OXLEY, VICTORIA)
ROBLING, CHARLES AND CINDY)
SCHERZINGER, JEFF SIMPSON AND)
SANDRA MURPHY, FRED AND RUTH)
THIEN, WILLIAM D. TRIBBIE, CLARENCE)
AND JANICE WOLFE, and JOHN AND)
CHRISTINE ZIMMERMAN,)
Plaintiffs,)
v.) 3:06-cv-184-RLY-WGH
ALCOA, INC., and ALCOA FUELS, INC.,)
Defendants.)

**ENTRY ON PLAINTIFFS' MOTION TO REMAND, DEFENDANTS'
JOINT MOTION TO DISMISS , DEFENDANT ALCOA FUELS'
MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION
TO STRIKE MEMORANDUM IN SUPPORT OF NOTICE OF REMOVAL**

I. Introduction

This matter is before the court on Plaintiffs' Motion to Remand filed December 27, 2006.¹

II. Background

On October 23, 2006, Plaintiffs filed suit against The Aluminum Company of America, Inc.

¹Also before the court is Defendants' Joint Motion to Dismiss, Defendant Alcoa Fuels' Motion for Summary Judgment and Plaintiffs' Motion to Strike Memorandum in Support of Notice of Removal. Having determined that Plaintiffs' Motion to Remand must be granted, the court concludes that these motions are **DENIED, as moot.**

(“Alcoa”) and Alcoa Fuels, Inc. (“Alcoa Fuels”) in Warrick Circuit Court. Plaintiffs allege that Defendants disposed of “millions of gallons of toxic waste including coal tar pitch, potlining wastes, and chromium sludge” at the Squaw Creek Mine near Chandler, Indiana. (Complaint ¶ 1). Plaintiffs allege that this resulted in their exposure to toxic substances and lead them to develop various forms of cancer and other diseases. (*Id.* ¶ 4). The Complaint asserted state law causes of action sounding in negligence, infliction of emotional distress, nuisance, strict liability, and loss of consortium, as well as a violation of the Indiana Environmental Legal Action Statute.

III. Analysis

Defendants removed this case to federal court pursuant to 28 U.S.C. § 1441(b). If a case is removed to federal court, the non-removing party is permitted to move to remand the case back to the state court from which it originated in certain circumstances. One such instance is where there are statutory grounds for remand. *See* 28 U.S.C. § 1447. Pursuant to 28 U.S.C. § 1447(c), a district court may remand a case back to state court if the court lacks subject matter jurisdiction.

Defendants had removed this case to federal court arguing that Alcoa Fuels had been fraudulently joined. Plaintiffs argue that remand is necessary because there was no fraudulent joinder, that Alcoa Fuels is an Indiana citizen,² and that the court does not have subject matter jurisdiction in this instance. “Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or there has been an outright fraud in plaintiff’s pleading of jurisdictional facts.” *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993). In order to demonstrate fraudulent joinder, defendants must overcome a heavy burden. Defendants must show that, even after resolving both issues of fact and law in favor of plaintiffs, plaintiffs still cannot establish a cause of action against the in-state defendant. *Poulus v. Naas Foods, Inc.*, 959 F.2d 69,73 (7th Cir.

²Alcoa states in its Removal Notice that Alcoa Fuels is a “non-diverse” defendant and admits that Alcoa Fuels is an Indiana corporation. (Notice of Removal ¶¶ 4, 7)

1992). So long as there is a reasonable probability that Plaintiffs have a cause of action against Alcoa Fuels, there was no fraudulent joinder. *Id.*

In this suit, Defendants have failed to meet their burden of demonstrating fraudulent joinder. Resolving all issues of fact and law in favor of Plaintiffs, there is certainly a reasonable probability that Plaintiffs have stated a cause of action against Alcoa Fuels. There is at least some evidence that Alcoa Fuels retained control over the property at issue in this suit by way of a lease that explained that Alcoa Fuels retained the surface rights to the property. (Plaintiffs' Reply in Support of Motion to Remand at Ex. A). This court agrees that *Vandenbosch v. Daily*, 785 N.E.2d 666 (Ind.Ct.App. 2003), recognizes that there are exceptions to the theory of caveat lessee. The pleadings here establish that some "public use" of the areas under lease in the Fireman's Lake area has been made. A reasonably possible claim may arise against Alcoa Fuels under this theory. Additionally, there is some evidence that officers from upper-level management for Alcoa Fuels were on-site at the property, had some knowledge of what was taking place on the property, and might have even been responsible for operation or management of Alcoa. (*Id.* at Ex. B). If these facts are true, some of Plaintiffs' causes of action, including claims of negligence and strict liability, are viable claims against Alcoa Fuels.

Plaintiffs' Complaint also alleges a claim for "nuisance" under Indiana Code 32-3-6. The alleged disposal of toxic waste in areas where it might damage members of the public or other invitees is a cause of action which may yet be shown to apply here. The court's task at this stage is not to determine if Alcoa Fuels *is* liable to Plaintiffs by way of either retaining property rights or by way of piercing the corporate veil. Our task is only to determine if there is a reasonable probability that a cause of action exists, a question we must answer in the affirmative. Because Defendants have failed to satisfy their heavy burden of demonstrating fraudulent joinder, removal of this matter to federal court was improper under 28 U.S.C. § 1441(b). The court, pursuant to 28 U.S.C. § 1447(c), hereby **GRANTS** Plaintiffs' motion and **REMANDS** this suit to Warrick Circuit Court.

IV. Conclusion

For the reasons outlined above, Plaintiffs' Motion to Remand (Docket # 17) is **GRANTED**. The court **DENIES, as moot**, Defendants' Joint Motion to Dismiss (Docket # 10), **DENIES, as moot**, Defendant Alcoa Fuels' Motion for Summary Judgment (Docket # 12), and **DENIES, as moot**, Plaintiffs' Motion to Strike Memorandum in Support of Notice of Removal (Docket # 16).

SO ORDERED.

Dated: April 18, 2007.

s/*Richard L. Young*/dms (04/18/2007)

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